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No. 112.

Brf. of Wilson, Hoehling & Hay for Appellee.

# Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Nov. 15, 1900.

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ANNA V. WHITNEY, APPELLANT,

*vs.*

EDWIN B. HAY, APPELLEE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

## BRIEF ON BEHALF OF APPELLEE.

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E. B. HAY,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-13-1900

IN THE

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### PLEADINGS.

This is an appeal from a decree sustaining the original and supplemental bills of complaint filed by complainant, Edwin B. Hay, to secure the *specific performance* of a certain contract and agreement whereby one of the defendants, Richard U. Piper, in consideration of the promise of complainant to receive him and his wife into his home for the remainder of their lives, to furnish them board, and treat them with affectionate care, as if parents, had agreed to make title by will to complainant of lots Nos. 139, 140, and 141, square 193, and the improvements thereon, in the city of Washington.

The defendants named in the original bill are Anna V. Whitney, of Newport, Maine, appellant herein; the said Richard U. Piper, now deceased, and George Moore, trustee.

The original bill of complaint, setting forth in detail the contract and agreement aforesaid, was filed December 31, 1896, and alleged that the defendant Piper, in violation of his said contract, had made conveyance of the property above described to the defendant Moore as trustee, and, in further violation of said contract, had made conveyance thereof *in fee* to the defendant Whitney. The bill prayed that the conveyance in trust to the defendant Moore be set aside, and, further, that the defendant Whitney be decreed to be a trustee of the legal title of said property in trust for complainant, in accordance with the agreement aforesaid (*R., 1–6*).

Answers were filed by the defendants Whitney and Piper January 30, 1897, in substance denying the averments of the bill (*R., 7–14, 15–21*).

The defendant Moore filed answer, setting forth in substance that he no longer had any interest in the property, having released and reconveyed all his interest therein to the said Piper on July 14, 1896 (*R., 14, 15, 21, 22*).

Replication was filed by complainant February 9, 1897 (*R., 23*).

Supplemental bill was filed by complainant April 12, 1897, alleging that the defendant Whitney, notwithstanding the pendency of said equity cause, had instituted a landlord and tenant proceeding for possession of the property; and an injunction to restrain the prosecution of said summary action was accordingly prayed and granted (*R., 300*).

A further supplemental bill was filed November 2, 1897, setting forth the death of the defendant Piper on August 4, 1897, and averring that, by reason of all the premises, complainant had then become entitled to an immediate conveyance in fee from the defendant Whitney. It was stipulated by counsel that the defendants should be deemed to have answered said supplemental bill, admitting the fact of the death of defendant Piper, but denying the equity of the case, and that thereupon the cause should proceed to trial

on the pleadings, stipulation aforesaid, and testimony (*R.*, *300*, *301*.)

*Decree* was entered in favor of complainant Hay, March 9, 1898, directing conveyance forthwith by the defendant Whitney, as prayed, and further making the injunction, as to prosecution of landlord and tenant proceeding, perpetual (*R.*, *299*).

Defendant Whitney appealed in open court to the Court of Appeals of the District of Columbia (*R.*, *300*), which latter court *affirmed* the decree of the court below (*R.*, *327*; *Opinion*, *311–327*).

Thereupon defendant Whitney prayed an appeal to this court, and the same was allowed June 28, 1899 (*R.*, *328*).

FACTS.

The facts in the case are so conclusively and overwhelmingly established by the evidence that it is not believed there can be any serious controversy in respect thereof. It is proper, however, in this connection to call the attention of the court to the fact that the defendant Piper was examined as a witness in his own behalf, and denied substantially everything, without exception, even in the face of his own innumerable writings, which utterly disprove his testimony. It is but fair, however, to pass by his deposition without further comment, since it is evident that at the time he testified he was no longer in a condition of mind to intelligently or rationally comprehend the occurrences about which he was interrogated (*R.*, *23–41*).

The defendant, Richard U. Piper, was educated as a physician, had qualified himself as an expert in handwriting, was the author of a medical work, was a scientist, and first met Hay in Yankton, Dakota, in 1882, where both were testifying as experts in handwriting in a Government case. At that time Piper was about seventy years of age. He and his wife then were and for some time had been boarding in

Chicago. They had no children. He stated that he had brothers and a sister, but that the relationship between them was very much strained; that they did not care for him, nor did he care for them. Piper and Hay became quite intimate, and when the case was concluded, Hay, en route home, stopped off at Chicago, at the solicitation of Piper, to meet his wife, Mrs. Piper (*R., 176–178*).

The next meeting between the parties occurred during the early part of 1883, in Philadelphia, where both were again engaged in court during many weeks, Mrs. Piper also being there. At the conclusion of that case the Pipers visited Hay in his home in Washington, No. 1535 "P" street N. W., where they expected to remain but a few days (on their way to Chicago), but instead remained some six weeks. They did not wish to go away at all, and expressed a desire to spend the balance of their days with the Hays, and that they would be glad to treat them as their children, and that he would be willing to build a larger house, in which they could all live together, and that if they would consent Mrs. Piper could remain and he would go back to Chicago, pack up their trunks and belongings, and return. At that time the household comprised Mr. and Mrs. Hay and a baby boy; the house had five sleeping-rooms, hall-rooms, parlor, dining-room, and was sufficient in every way for the accommodation of the Hay family, leaving them two spare rooms. The house was owned by Hay, and he employed two servants therein. The proposition, however, was not then accepted, the Hays not wishing to give up their private home life (*R., 177, 178*).

The Pipers in their declining years, having absolutely no one near and dear to them, longed for love, affection, and kind attention—in short, a *home*, with all that that term implies; and, even prior to the visit last referred to, Piper wrote to Hay from Philadelphia, January 21, 1883, in which he expressed the wish that he really had the right to call him his boy (*R., 179*); and after the return of the Pipers to

Chicago the Doctor wrote a letter, July 6, 1883, heading it "Dear Son and Daughter," stating, "Thus you have given us the right to address you, and certainly we are both proud and glad to do so" (*R., 256, 257*). Again, March 7, 1884, the Doctor wrote, "Dear Son Edwin," stating, "How glad we should be to see you all, daughter Florence and both the little ones" (*R., 257*). On December 23, 1885, the Doctor sent a letter, addressed "My Dear Boy," in which he expressed his wish to come to Washington as a place of residence, suggesting that he could "command $25,000 certainly, and perhaps nearly as much more," and adds, "We have no relations or friends to whom we owe anything as to the final disposition of our property." The letter closes, "Good night, with much love to you all, son, daughter, grandchildren and all. R. U. Piper" (*R., 180*).

On January 14, 1886, another letter was sent, commencing "Darling Edwin and Florence," stating that the Doctor had made his will, bequeathing to them his entire estate, save about $500, and, further, giving information where the will would be found, and full directions in event of their death, and concluded "As ever, affectionately, Father and Mother Piper" (*R., 180*).

Again, on June 8, 1886, another letter, addressed "Darling son Edwin and daughter Florence," and closing, "and believe us to be now and ever on this side, and the *other* if permitted, your affectionate father and mother, R. U. and E. F. Piper" (*R., 181*).

November 7, 1886, another letter enclosed a duplicate draft for $5,300, which was sent from California, as explained, to insure against loss should Dr. Piper and his wife meet with an accident on their way East (*R., 182, 183*).

Another letter, of November 19, 1886, states cash on hand $20,000, and asks complainant's advice as to its investment (*R., 183*).

A daughter having been born to the Hays, she was named "Elizabeth Frances Piper Hay," at the request of Mrs. Piper, as contained in her letter of December 15, 1886 (*R., 183*).

Finally, Mr. and Mrs. Hay consented to the Pipers' coming to make their home with them, as so insistently urged by the Pipers, as above shown, and communicated that fact in a letter (*R., 184*), in reply to which came a letter, dated March 11, 1887, addressed "My dear son, Edwin," suggesting that if not perfectly convenient for them to come then, they would wait, and adding, "Now, my dear son and daughter, tell us the exact truth in regard to this matter, as *there should surely be no hesitation in stating facts between us;*" signed "As ever, affectionately, Father and Mother Piper" (*R., 184*).

Then, on March 18, 1887, came a letter stating that the Doctor was unwell; that "if we live, and Doctor is able, I think we will start for W. some time next week, today being Friday, the 18th." (*R., 315*).

From January, 1883, until March 25, 1887, at which time Dr. and Mrs. Piper arrived in Washington, to take up their abode with the Hays, at No. 1535 P street northwest, letters innumerable were received from the Pipers, couched in the most affectionate and endearing terms, addressed "Son Edwin," "Daughter Florence," and signed "Father and Mother Piper," etc. (*R., 179–184*). The character of these letters will be found sufficiently indicated in the extracts above given.

It may be here proper to remark, as is above abundantly shown, that during all the years from 1883 to 1887 the Pipers held out every inducement and made every advance to persuade the Hays to consent to the arrangement subsequently entered into. The Hays were not desirous of making the arrangement, and only consented after repeated and continued urging by the Pipers, covering a period of about four years (*R., 155, 178, 184, 265*).

Some time prior to the arrival in Washington of the Pipers, complainant had expended some $3,000 in enlarging his home, erecting a bay window, also a back building, thereby providing an additional and larger dining-room, a sleeping-room, and hall and bath-room, thus making the

home in every way adequate and sufficient for the needs of the Hay family (*R., 186, 187*).

Immediately prior to the arrival of the Pipers complainant, "*realizing that this was to be a lifetime affair*" and in preparation for their accommodation, repainted, repapered, and furnished, entirely at his own cost, two rooms—a bed-room and another room for the Doctor's paintings, etc.—for the exclusive use of the Pipers, in addition to which, of course, they were to have the joint use along with the Hays of the entire house (*R., 146, 186*).

The complainant, testifying on his own behalf, stated the agreement so finally brought about, as above shown, as follows:

"Pursuant to the conversations we had had, and the communications that had passed between us prior to their arrival, they came to live with us as a mother and father would come to live with children, and their dwelling with us was conditioned upon a covenant and agreement entered into that in consideration of permitting them to reside with us in this relationship during the balance of their lives, and the services and care to be given to them, that he (Piper) would build a house in the city of Washington, District of Columbia, in which we would live together, and that at his death, not only the house, but all his property should be willed to me. And Doctor Piper further stated that, should I be taken away, he would provide for Mrs. Hay and the children, as if they were his grandchildren and she his daughter; and that should both of us be taken away during his lifetime, that he would likewise provide for the children, and that he would rear and raise them; and upon this Mrs. Piper and Doctor Piper, Mrs. Hay and myself shook hands, and the Doctor himself called upon Heaven to witness the sincerity of the agreement" (*R., 184, 185*).

Thus the relations were brought about and the *home* arrangements entered into, and from first to last the Pipers paid no board during the years they remained with complainant, and contributed nothing to payment of expenses (*R., 185*).

Shortly after their arrival the Doctor commenced discussing the building of a larger home, the better to accommodate the family as thus augmented; this became his daily thought and topic of conversation (*R., 188, 265*). The Doctor and Mr. Hay looked at a great many lots, and finally the lots on Corcoran street were selected, purchased, paid for by, and conveyed to, Doctor Piper; an architect and builder were selected by the complainant, and the erection of the house, planned to suit him and his wife, was begun in August, 1887. Plans and sketches were made and revised, complainant having drawn the plan according to which the house was built. It was built with especial reference to the accommodation of the two families; was a double house, and made large enough to give the Doctor and wife a bedroom, sitting-room, private bath-room, and an extra room for his pictures. The Doctor desired everything made and arranged to the satisfaction of Mrs. Hay (*R., 105, 111, 128, 188, 189, 265*).

The agreement by the parties hereinabove referred to is further established by the testimony of Mrs. Kearfoot, who, being interrogated in regard thereto, stated:

"It was made in his room at No. 1535 P street. I cannot state the time or date, but it was about the time that the house was being built, and Mr. and Mrs. Hay, Doctor and Mrs. Piper, and myself were present.

"Doctor Piper said that in consideration of Edwin, his son, and Florence taking care of them the rest of their lives, and they being one common family in the house which he was about to build, that he intended and was going to make a will to the effect that this house, as well as the Chicago property and other property of which he might be possessed at the time of his death, to Mr. Hay or Edwin; or, in case of the death of Mr. Hay before their death, the same was to apply with regard to Mrs. Hay, and the property would all go to her; or, in case of the death of both Mr. and Mrs. Hay before their own death, that he would take it upon himself to care for the children and to bring them up and, if possible, to place Edwin's son, that is Ned, Jr., in whom he took

great interest—that he would place him in life, and that then the property would go to the children of Mr. and Mrs. Hay" (*R., 266*).

Interrogated as to what formality, if any, was gone through with on the occasion of this contract being talked of, the same witness adds:

"There was no writing, but they shook hands" (*R., 267*).

While the house was being built Piper employed William A. Cook, attorney, to draw his will, instructing him to include therein the said property on Corcoran street and the lots on which it stands, and all of his property, wherever situate, especially naming certain property in Chicago, devising all of the same to complainant, in trust for testator's wife during her life, and at her death to complainant in fee (*R., 173, 190, 268*). The will was prepared accordingly, and duly executed by Doctor Piper in the presence of witnesses (*R., 173*).

The following extracts from the testimony of witnesses, selected at random from all walks and stations of life, may be here usefully referred to, showing the existence of the agreement between the parties and its terms:

Louis Kaufman, tailor:

"'He is my boy, and I am going to build him the house,' and he told me that he had adopted him, and that Ned was to take care of him for that, and he was to leave him this house. Often he has told me that" (*R., 85*).

Albert T. Coumbe, lawyer:

"He always told me that Edwin was his son and Florence his daughter, and that he looked upon them as his children. He used to talk about building this house, and that Edwin and Florence were to have everything on his death, and that they were to live there as one family, and that Edwin was to have his house at his death" (*R., 89*).

GEORGE A. DARLING, clerk, Treasury Department:

"Always referred to Mr. and Mrs. Hay as his children; always called Mr. Hay 'Son Edwin.' [Speaking of remarks of defendant Piper:] Yes, it is a large house, but I am building it for Edwin and Florence, and they are going to live here, and we are going to live with them" (*R., 93*).

Mrs. PEARL MULLETT, widow of Architect A. B. Mullett:

"Both Mrs. Piper and the Doctor gave me to understand that they were building this house to be used by the Doctor during his lifetime, and that afterwards it was to be Mr. and Mrs. Hay's. He said that he was building the house for Edwin and Florence, and they were to have it at his death" (*R., 104*).

Doctor G. WYTHE COOK, attending physician of the Pipers and friend:

"I heard Doctor and Mrs. Piper both say that they were their children, and that they were to have their property [referring to the house]. The impression was made indelibly upon my mind because I heard him refer to them as his children, and speak of his property in this way so often" (*R., 122*).

W. F. KEENAN, the builder of Corcoran Street house:

"He said he was building the house as a residence for himself during his lifetime; that he had adopted Ed. Hay and his wife as his children, and that at his death this property would go to them. He told me that on more than one occasion" (*R., 126*).

PETER S. KEMON, steam heating, &c.:

"He stated that Mr. Hay and his wife were practically adopted by him, and the house was one that was erected for the benefit of Mr. and Mrs. Hay, and that they were to live with Mr. and Mrs. Hay during their lifetime, and the property was to be Mr. and Mrs. Hay's" (*R., 132*).

RICHARD K. EVANS, lawyer:

"He said: 'I am going to live here always with Ned and Florence, and they are to take care of me all my life, and make it comfortable for me, and I am going to take care of them in consideration for that.' * * * Now I have arranged with Ned or Edwin that he is to provide for me for my life, and in consideration for that I am going to return it by giving all I have to him (*R., 138, 139*).

To the same effect is the testimony of Wm. E. McLean, formerly Deputy Commissioner of Pensions (*R., 118, 119*).

HANNAH FRANEY, cook:

"He said he wanted a larger house to make Edwin a present of; at his death it would come to Edwin and the children" (*R., 144*).

ALBERT S. BROWN, then law student:

"He told me about his plans; that they were going to construct this new house on Corcoran street for Edwin and Florence; that they had adopted him; that he and Mrs. Piper expected to spend the balance of their days with them, and that this house that they were living in (that is, this P Street house) was too small; they didn't have enough room; that a new house was to be built according to Edwin's and Florence's ideas. It was to be built for them and for their home; * * * that in consideration of their care and kind treatment and the home that they would have with them, * * * this property was to be theirs at his death. * * * *He seemed to lay particular stress upon the affection and comfort, and stated that they were something money could not buy.* * * * Told me that he had no near relations; none that cared anything for him, or he cared anything about; that he never had a home, and that what he wanted was a comfortable home" (*R., 165, 166, 170*).

In addition to the foregoing, see also the testimony of James Schouler (the well-known legal author, writer of text-books, and historian, and whose wife was a cousin of Mrs. Piper):

"The impression thus formed was that the Corcoran Street house was built as a common home where Doctor and Mrs. Piper would live for the rest of their lives with the Hay family, *and that they regarded Edwin B. Hay as an adopted son, substantially intending that he should have the property at their death.* Their relations always seemed affectionate, like parents and children, and Doctor and Mrs. Piper always spoke to me of Mr. Hay and his wife in the most loving terms. * * * He always gave me to understand that the arrangement was to continue for life. *I know nothing of what was to be paid, or the terms of board, but understood it was not optional for either party to terminate the arrangement without the consent of the other*" (*R., 50–52*).

Mrs. SCHOULER (wife of the last witness and cousin to Mrs. Piper) testified, in substance, the same as her husband, and added:

"The arrangement was that they were to live with the Hays for the remainder of their lives, and that upon their death the house was to go to the Hays, and that they had made their wills to that effect. * * * I know nothing of any dollar-and-cents arrangement in this matter, but I do know that Doctor and Mrs. Piper were to live with Mr. and Mrs. Hay during their natural lives, and to be taken care of as their parents, and at their death the house on Corcoran street was to go to Mr. and Mrs. Hay" (*R., 53–55*).

The house was finally completed in August, 1888, and the two families moved in. All the furniture was transferred from the P Street house to the Corcoran Street house, and complainant expended about $1,200 for additional furniture; he also removed the crystal chandeliers from the P Street house to the new one, and replaced those removed at his own expense; complainant employed but two servants at the P Street house, and four were required at the Corcoran Street house, thus increasing servants' wages $250 per year; coal, $75 per year before, and $312.50 per year at the Corcoran Street house; water rent, $6.12, increased to $18 per year; taxes, $60 per year formerly, $200 a year for the Cor-

coran Street property; gas, $36 per year, increased to $96 per year; increase about $50 or $75 per month in expenditure for food after Pipers joined the family; thus increasing the household and living expenses of complainant about $1,500 per year during the period the two families lived together, over five years, in addition to the $1,200 expended by complainant for furniture for the new house as above, all paid by complainant. After moving out of the P Street house it remained idle for a year, then rented for a couple of years, then idle again, and so on (*R., 193–197*).

Formal delivery of the property by Doctor Piper to Mr. Hay was evidenced by handing over the keys of the property to complainant and the delivery of possession (*R., 239*).

Doctor Piper was not fond of society; was somewhat peculiar and eccentric; had to have special diet, as he was a dyspeptic; meals required to be just on the hour; lunch always served in his room. He retired promptly at nine o'clock every evening. Complainant and his wife were fond of society and had always gone around a great deal, but thenceforth they both devoted themselves to the entertainment of the Pipers, remained at home, and brought in friends to entertain the Doctor. Prior to the time when the Pipers came to live with the Hays, the latter spent a part of the summer months away from the city and closed their house. Afterwards the house was kept open all summer, even if the Hays were away (*R., 146–151, 160, 161, 187, 197, 198, 199, 267*).

The Pipers were perfectly happy and contented in their home life, as appears abundantly throughout the entire record, and the relations continued most cordial and pleasant up until the departure of the Doctor and his wife for Saratoga, in August, 1892.

It seems that, without the knowledge of complainant, and on the night prior to their departure, namely, on August 25, 1892, both the Doctor and his wife had executed wills, and had left them in a drawer in their apartments in the

Corcoran Street house, where they were found several years later. The will of the Doctor, subject to two legacies amounting to $2,500, and one picture with frame, left all of his estate, real, personal, and mixed, to the complainant, to be his absolutely, and appointed him executor (*R.*, *280*).

While in Saratoga many letters were received from the Pipers from September 2, 1892, to November 26, 1892, the letter being the last letter written by Mrs. Piper before her death (*R.*, *292–296*). It will be noted that these letters were the same in tone as all of the letters heretofore referred to, and the very last letter written by Mrs. Piper before her death, indicating her changeless affection and entire satisfaction, is addressed "Dear Son Edwin," and concludes, "As ever, affectionately, Mother Piper" (*R.*, *296*).

During their visit in Saratoga, Mr. Hay made five trips at his own expense, in obedience to Doctor Piper's requests (*R.*, *201*, *202*). During one of these visits, and on December 6, 1892, Doctor Piper made and executed a will, sitting by the bedside of his then dying wife; which will devised his property, including the Corcoran Street house, to his wife for life, and at her death to the complainant in fee-simple, subject to certain bequests of personal property, and appointed complainant the executor. Said will was duly executed in the presence of three witnesses (*R.*, *82*, *83*, *203*).

Mrs. Piper died January 3, 1893, at Saratoga (*R.*, *203*). Doctor Piper was very much affected by her death, and did not return with the remains. Complainant went to Saratoga, made all the arrangements, and brought the remains back. The Doctor, owing to the use of drugs and stimulants of some kind, had become quite unmanageable and was in the charge of a physician and nurse. At that time one Thomas, of Chicago, who had been an acquaintance of Doctor Piper and had acted for him as an agent, arrived on the scene (*R.*, *205*); complainant went to Saratoga twice subsequent to the death of Mrs. Piper to bring the Doctor home, but each time it appeared that he

was not well enough to stand the journey. On January 25, 1893, Thomas suddenly left Saratoga for Chicago, taking the Doctor with him, although not a hint of such contemplated removal had been communicated to the complainant. From that time until about June, 1895, the Doctor was kept in Chicago, completely under the influence of Thomas, and although complainant made two trips to Chicago at his own expense, and at the request of Piper, by letters and telegrams, to bring him back, he did not succeed in accomplishing it (*R., 212–216*). Subsequently and in June, 1895, the defendant Whitney visited complainant to inquire about her uncle, and being informed of the state of affairs existing, said she would go to Chicago and bring him home (*R., 217*). It seems she went to Chicago, but instead of bringing the Doctor home, as promised, she took him to her home at Newport, Maine. From then on it will be noted that the tone of the correspondence entirely changed, and was carried on in the handwriting of the defendant Whitney, the signature only being that of the Doctor. While in Chicago it seems that Thomas had succeeded in having Piper execute a deed in trust to the defendant Moore of all his property in favor of Thomas as beneficiary. Most of the Newport correspondence refers to proceedings proposed to be instituted in Chicago to set aside that deed (*R. 218–221*).

In June, 1896, the defendant Whitney called upon the complainant in Washington, but nothing was said by her about any then contemplated conveyance to her from Dr. Piper of the Corcoran Street house (*R., 224*).

On August 4, 1896, Dr. Piper executed a deed of conveyance to the defendant Whitney of the property in suit, but the deed was not recorded until October 17, 1896 (*R., 301, 302*). No notice of any kind was given complainant of the execution of said deed, and the first knowledge acquired by him was from its being recorded (*R., 224*).

The defendant Whitney, grantee in said deed, was a niece of Piper, born on October 9, 1865, and from the first time her uncle saw her, which she thinks was when she was a baby, she did not see him again until she came to Washington, in 1889, a period of twenty-four years (*R., 60*). (The record further shows that during the years and until Dr. Piper was taken to Newport he had no communication whatever with any of his relations.) The defendant Whitney testifies that the Doctor gave her the deed *without any consideration*, except that she gave him a life lease back. "*I never gave him any more than that*" (*R., 62*). That defendant Whitney had knowledge of the existing conditions between the Piper and Hay families when she visted there in 1889 is clearly indicated by the fact that she told complainant that upon her return home after said visit she had told her mother that her uncle and aunt were nicely fixed, and "he seemed to be very fond of the people with whom he resided, and that he no doubt would leave his property to them by will" (*R., 223*). Defendant, testifying in her own behalf, admits substantially the statement just quoted, and adds, "I thought possibly he might remember them in his will" (*R., 60*).

As above shown, the agreement on the part of complainant had become fully executed and performed, so far as Mrs. Piper was concerned, up to and including the time of her death; and while the Doctor thereafter continued to remain away from the home so established, no default can be charged against complainant because thereof, as he constantly kept the Doctor's rooms intact for his use and urgently and constantly requested the Doctor to return to his home; hence, so far as complainant is concerned, the evidence is uncontradicted that he faithfully and in all respects kept and performed his agreement (*R., 215, 222, etc.*).

The foregoing references to the testimony indicate substantially the character of the proofs and evidence in this case, and the facts so recited are absolutely uncontradicted and cannot be questioned. A few objections (aside from the

legal features of the case) have been referred to by defendants as tending to show reasons why complainant is not entitled to specific performance of the agreement. For example, it is objected that complainant failed to carry out some trifling features of his contract; that the Doctor's room was not kept as warm as he liked it (although everyone else found it hot to suffocation); that at times his steak was not cooked to suit him, and that Mrs. Hay displeased him by changing her religion and becoming a Catholic, and it is pointed out by defendants that thereupon the Doctor went to Mark D. Brainard, a lawyer, to change his will (but even that will recognized an obligation to complainant, as it contained a legacy in his favor for $10,000); that Mrs. Hay was disagreeable and his wife unhappy, although all the correspondence refutes the charge. There seems to be no specific complaint against complainant, nor any charge that he neglected, in any way, to carry out and faithfully perform the obligations of his agreement (*R., 62–64–67, 68, 72, etc.*).

It is also objected that complainant signed a lease with Dr. Piper in respect of the occupation of this property. In connection with this lease it is to be observed that the same was not thought of nor executed until October 20, 1893 (*R., 42*), at which time the Doctor was under the complete domination of Thomas, at Chicago, and from whom it doubtless emanated. Complainant explains the circumstances of its execution. It was a part of complainant's agreement to care for, support, and maintain Dr. Piper during his life (Mrs. Piper having died, as above shown, and complainant's contract, so far as she was concerned, having thereby become completed and executed), and inasmuch as the Doctor, although through no fault of complainant, continued to remain in Chicago, the complainant recognized it as being part of his obligation to contribute toward the maintenance of the Doctor, and—

"Realizing the situation of Dr. Piper, and not knowing what might be done by Thomas to rob both Dr. Piper and

myself of the home, and wishing to make an allowance to Dr. Piper, to which he was entitled, I signed this lease, knowing that whatever might occur it would hold me in possession of the property at least during its existence, and that before that time the adjustment of the matters by Dr. Piper and myself would be consummated, looking to his return home and his continuing with us, in accordance with our agreement. I complied with the terms of the lease, after it was signed by me, and I never denied the right of Dr. Piper to have an allowance made to him, if he so desired it" (*R., 214*).

He further testified that the paper was not intended to release Dr. Piper from the original agreement, and that the allowance to him in lieu of board seemed justifiable, whether made in that form or another (*R., 216*).

This explanation is borne out and corroborated by the following evidence. Along with the lease, the following paper was sent to him by the Doctor for execution and return, but which complainant did *not* execute:

"Whereas, certain dealings and agreements have heretofore been had and made between Edwin B. Hay and Richard U. Piper, among which were certain agreements and transactions in relation to the house, No. 1512 Corcoran street, in the city of Washington, D. C., and

"Whereas, the said parties have this day, made a full settlement of all amounts, accounts and agreements heretofore had, made and entered into between them,

"Now, therefore, I, Edwin B. Hay, do hereby acknowledge that I have received full payment and satisfaction of all the claims and demands in any way arising or growing out of any agreements or transactions heretofore had between the said Piper and myself; *and further that I have no claim or interest of any kind or nature in the premises above described, No. 1512 Corcoran street, in the city of Washington, D. C.*, except the leasehold interest which I have therein under the lease from the said Piper, bearing even date herewith.

"In witness whereof, I have hereunto set my hand and seal this 20th day of October, 1893" (*R., 216*).

This release complainant persistently refused to execute, although Dr. Piper continually requested him to do so. In a letter dated April 9, 1894, the Doctor states:

"You seem to have forgotten that I sent you a receipt *gotten up by the Judge*, which you were to sign and return. I do not see why you cannot please me in this by doing what I have several times requested. You know I have treated you finely in my will" (*R., 217*).

In another letter of the same purport, bearing date July 9, 1894, the Doctor states:

"I should like much to have *the receipt which the Judge made for me*, which I have requested several times. * * * Very truly, R. U. Piper, by T. Dictated" (*R., 257, 258*).

[NOTE.—This letter is in the handwriting of Thomas.]

Still another letter from the Doctor, dated July 29, 1894, states:

"Have you not received my letter containing rent receipt, etc.? * * * I have before told you I have left you in will many times the whole rent, etc. Please send me receipts asked for as soon as possible" (*R., 280*).

Dr. Piper subsequently told complainant that the whole matter of the lease was a part of a scheme of Thomas and instigated by him (*R., 217*), and that fact is strongly corroborated by the physical and mental condition of Piper at the time of Thomas' control over him and the execution of the conveyance for Thomas' benefit. If complainant was nothing more than a tenant of Dr. Piper, what was the necessity for securing and insisting upon the execution of a release of the character above indicated?

## Argument.

### I.

### An agreement to devise land may be specifically enforced in equity.

In the court below counsel for appellant in their printed brief stated:

"That a person may make a contract binding himself to dispose of his real estate by will, in a particular manner, and that such contract may, under certain circumstances, be specifically enforced, is admitted; but such a contract is always looked upon with suspicion, and when sought to be established by oral testimony and to be specifically enforced, must be fair and equitable in its conditions, based upon an adequate consideration, and fully or substantially performed by the parties seeking such relief."

It was insisted, however, by counsel for appellant, that such contract had not been made out by the *proofs* in this case. It may be here remarked that the limitation of the rule, as stated by counsel for appellant and above quoted, that "such a contract is always looked upon with suspicion," is not supported either by the authorities cited or by reason.

While the objection was not interposed in the pleadings and not relied on therein, counsel for appellant, notwithstanding their statement of the rule of law, as above quoted, have insisted that this contract was not in writing, and that therefore this case comes within the prohibition of the statute of frauds and cannot be sustained.

That complainant has fully established by the proofs the contract sued upon would hardly seem to admit of serious controversy, and that the authorities and decided cases thor-

oughly support the decree passed in this case seems equally conclusive. Take, for example, the following cases:

"Specific performance of parol agreement will be compelled by a court of equity where one party to it has wholly or partially performed it on his part, so that its non-fulfillment by the other party is a fraud."

Johnson *v.* Hubbell (10 N. J. Eq., 332).
Rivers *v.* Rivers' Ex'rs (3 Desau., 195).
Izard *v.* Middleton (1 Desau., 116).

In Johnson *v.* Hubbell (10 N. J. Eq., 332) the court held:

"Agreements for family arrangements with respect to property are viewed with favor by this court. They ought to be respected and scrupulously carried out by the parties to them; and if they are not, a court of equity ought to enforce their execution.

"Held: That an agreement, on good consideration, and without fraud or undue influence, to devise land, is valid, and will be enforced by compelling a conveyance from heirs of the promisor or purchaser *with notice from him in his lifetime.*"

David C. Rarsell *v.* Abraham Stuker (41 N. Y., 48).
James Davidson *v.* James W. Davidson (13 N. Y., 246).
Van Dyne *v.* Vreeland (12 N. J., 143).
Gupton *v.* Gupton (47 Mo., 37).
Hyatt *v.* Williams (78 Mo., 214).
Twiss *v.* George (33 Mich., 253).
Warren *v.* Warren (105 Ill., 568).
Atkinson *v.* Jackson (8 Ind., 31).

Again, in Pfluger *v.* Pultz (43 N. J. Eq., 440), a case quite similar in its facts to the case at bar, the syllabus correctly states as follows what was there decided:

"In June, 1883, defendant *verbally* agreed with the complainant that if she would do his housework and take care of him during the remainder of his lifetime, he would devise to her the house and lot wherein he then lived. She did

thus care for him until 1886, when, without sufficient cause, he left the place to live with one M., and shortly afterwards made and delivered to M. a deed for his house and lot, taking from M. a bond conditioned that M. should support him during his lifetime.

"Held: First, that complainant was entitled to relief by enjoining the conveyance of the property to M.; second, that the agreement was not invalid under the statute of frauds, and was enforceable."

This case of Pfluger *v.* Pultz is so nearly identical in its facts with the case at bar that the attention of the court is particularly asked to the opinion there rendered.

So, in the case of Brinker *v.* Brinker (7 Pa. St., 53): Brinker resided with his father upon a tract of land, was about to remove, and the father agreed that, if he would remain, he would, under certain conditions, devise the land to him by will. The son assented to the terms, and the father made his will accordingly, but the will was thereafter destroyed, lost, or stolen. Chief Justice Gibson, delivering the opinion of the court, stated:

"As the agreement was to convey the estate by will, it cannot be executed to the very letter * * * and though the case before us is not within the letter, it is certainly within the equity and spirit of it. * * * What difference can it make, in reason or justice, whether the conveyance was to be by deed or will? The same good faith which requires it to be enforced in the one case requires it to be enforced in the other—not in form but in effect.

"The statute of frauds interposes no bar to it; not perhaps for the supposed part execution of the contract, for possession does not distinctly appear to have been changed in pursuance of it; but because the terms of it were put in writing in the father's will; and though the will itself is lost, the substance of the devise is proved. Cannel *v.* Buckle (2 P. Williams, 243), in which an instrument designed as a deed, but became void by subsequent circumstances, was allowed to operate as a written agreement in order to satisfy the statute, is very like the present case.

"As the will contained the conditions of the contract, the parties had done enough to satisfy the statute."

Citing—

Robertson *v.* Robertson (9 Watts, 32).
Woods *v.* Farmare (10 *id.*, 195).
Haslit *v.* Haslit (6 *id.*, 464).
Sage *v.* McGuire (4 Watts & Serg., 228).

In Stone *v.* Hayden (62 Mo., 101–115), in a suit of this character, it was held:

"First, and generally, that equity will sustain an action of this description; second, that such promises, if not clothed in technical terms, would be sufficient, if no doubt remained as to intention; third, that the promise need not be in writing, but would be sufficient if made orally; fourth, that the agreement having been acquiesced in and carried out by the party complaining is sufficient to be sustained. * * *

"There are things which money cannot buy; a thousand nameless and delicate services and attentions, incapable of being the subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation on that direction by decreeing the specific execution of the contract."

And again:

"A contract for the adoption of a child, and leaving all of one's property upon such person's death to such child, is a valid contract, and upon performance of such duties by child, such contract or agreement, although oral, is taken out of the statute of frauds, and will be specifically enforced."

Van Dyne *v.* Vreeland, 11 N. J. Eq., 370.
Davison *v.* Davison, 13 N. J. Eq., 246.

In the recent case of Burdine *v.* Burdine's Executor, decided September 13, 1900, supreme court of appeals of Virginia (Virginia Law Register, vol. 6, No. 6, pp. 389–396), it was held that agreements to dispose of property by will may

be enforced, the court citing, in its opinion, 3 Parsons on Contracts, sec. 406 (6th Ed.); Hale *v.* Hale (90 Va., 728, 730); Cox *v.* Cox (26 Gratt., 310), (the latter being a case of verbal agreement to devise property by will). See also Rice *v.* Hartman (84 Va., 251); Thomas *v.* Armstrong (86 Va., 323); Graves, Real Prop., 97.

The case of Shakespere *v.* Markham (72 N. J., 400), cited by appellant, expressly recognizes the rule that equity may enforce specifically the performance of contracts to dispose of property by will.

The same rule of decision has been uniformly adhered to and followed in the decisions of this court, as will appear from the following cases:

In the case of Neale *v.* Neales (9 Wall., 1–12) a father agreed, in parol, to give land to a woman about to marry his son (who was an improvident person), she promising to build a house upon it out of her own money. Possession was delivered, the house was built, but the father refused to convey. Thereupon a bill was filed by the son and wife against the father, setting up said parol agreement, its performance on the part of the donee, and a specific performance prayed accordingly. It was objected, in that case as in the present, and as in many others, that the contract was not in writing, and that therefore, under the statute of frauds, relief could not be afforded. The court, however, declined to accept that view and held:

"Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property."

And again, in the case of Townshend *v.* Vanderwerker (160 U. S., 171–184), Mr. Justice Brown stated:

"The general principle to be extracted from the authorities is, that if the plaintiff, with the knowledge and consent of the promisor, does acts pertaining to and in obvious re-

liance upon a verbal agreement, which so changed the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defense, and thus to receive to himself benefits done by the plaintiff while the latter is left to the chance of a suit at law for the reimbursement of his outlays, or an action upon a *quantum meruit* for his services."

Aside, however, from the foregoing authorities, it would seem that the case at bar has been decided on all points by the decision of this court in the case of Brown *v.* Sutton (129 U. S., 238–248). In that case the court held, what is thus correctly expressed in the syllabus:

"1. That the appellant's intestate intended that the property in dispute should belong to the appellee, that he bought it for her, and that he promised her *orally* that he would make over the title to her upon the consideration that she should take care of him during the remainder of his life, as she had done in the past.

"2. That there had been sufficient part performance of this parol contract to take it out of the operation of the statute of frauds, in a court of equity, and to render it capable of being enforced by a decree for specific performance."

It will be observed that there the court sustained the relief prayed in a case where the contract and dealings of the parties rested entirely in parol and without the support and corroboration of writings, so far as disclosed by the report of the case. The case at bar, however, is much stronger on the evidence, since the record is simply filled with writings, letters, wills, etc., which strongly corroborate and support the fact of the existence of the contract alleged in the bill, as well as its terms, thus making it absolutely certain beyond controversy, *not only* that such a contract did exist, but the terms of it.

## II.

A PROMISE TO TRANSFER THE TITLE OF REAL PROPERTY BY WILL IS EQUALLY ENFORCEABLE WITH ONE TO TRANSFER BY DEED.

This principle and rule of decision is recognized and affirmed in the decisions above referred to, the material element in such case being the certain intention to transfer the property, and not the particular manner in which the transfer of title is to be effected.

See Van Dyne *v.* Vreeland (11 N. J. Eq., 370–381); Pfluger *v.* Pultz (43 *id.*, 440); Carmichael *v.* Carmichael (72 Mich., 76, 85); Gupton *v.* Gupton (47 Mo., 37); Sharkey *v.* McDermott (1 *id.*, 647); Neale *v.* Neales (9 Wall., 1); Brown *v.* Sutton (129 U. S., 238), and Townshend *v.* Vanderwerker (160 U. S., 171).

This principle applies not only in the case of agreements where the date of the promised conveyance is fixed and certain, but also where it is unfixed and indefinite. Brown *v.* Sutton (*supra*); Townshend *v.* Vanderwerker (*supra*); Young *v.* Young (45 N. J. Eq., 27), and Lamb *v.* Hinman (46 Mich., 112).

## III.

ASIDE FROM THE MEMORANDA OF THE CONTRACT, ESTABLISHED BY THE VARIOUS WRITINGS SET FORTH IN THE RECORD AND BY THE ORAL TESTIMONY, THE ACTS OF PERFORMANCE BY COMPLAINANT ARE SUFFICIENT TO TAKE THE CASE OUT OF THE STATUTE OF FRAUDS.

In the present case all the facts strongly tend to show that the acts of performance on the part of complainant

directly refer to and result from the agreement relied upon. His relations to Piper were undoubtedly such as they would not have been in the absence of an agreement of some kind. The conduct of complainant's household and of his private home life was entirely changed; his household and living expenses substantially increased; his cares at home augmented, his family enlarged; and upon his domestic and social life were imposed conditions and restraints to secure the comfort and gratify the whims of an aged couple. All of this was done upon the express solicitation and with the knowledge and consent of Piper and his wife, who were the recipients of the benefits accruing to them from the acts of the complainant, who was thus performing his part in faithfully keeping the agreement which had been so solemnly entered into; and, as above shown, his agreement, so far as it embraced Mrs. Piper, was fully and completely performed and terminated at her death.

In the case of Lamb *v.* Hinman (46 Mich., 112) Judge Cooley clearly expresses the reason of the rule as follows:

"The reason why taking possession under an oral contract is recognized as a ground for specific performance when payment of the purchase price is not, is that in one case there is no standard for the estimate of damages when the contract is repudiated, and in the other there is a standard that is definite and certain. A purchaser who takes possession of land under an oral purchase is likely in so doing to change very considerably—perhaps wholly—the general course of his life as previously planned by him; and, if he is evicted on a repudiation of the contract, any estimate of his loss by others must in many cases be mere guesswork."

That such acts of performance as appear in this case are sufficient to take the case out of the prohibition contained in the statute of frauds is conclusively shown by the authorities above cited, and is particularly decided adverse to the contention of appellant herein in the cases of Neale *v.* Neales, Brown *v.* Sutton, and Townshend *v.* Vanderwerker, *supra*, in

none of which cases would it appear that the acts of part performance there relied upon were nearly so strong and convincing as those set forth in the present record.

## IV.

SUCH AGREEMENTS SOUGHT TO BE ENFORCED MUST BE CERTAIN IN ESSENTIAL TERMS. THE CERTAINTY OF PROOF REQUIRED IS NOT ABSOLUTE, BUT REASONABLE.

In the case of Mundy *v.* Jolliffe (5 Myl. & Cr., 177) Lord Cottenham, speaking of the great injustice which would arise from permitting a party to escape from an engagement entered into, upon the ground of the statute of frauds, after the other party to the contract has acted upon the faith of such engagement and has expended his money or otherwise acted in execution of the agreement, states:

"Under such circumstances, the court will struggle to prevent such injustice being effected, and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were."

And, again, in the case of Neale *v.* Neales, *supra*, the same rule of proof was followed, as thus stated in the syllabus:

"In case of an alleged contract, by a father, of this kind, *reasonable certainty as to the fact and terms of it is all that equity required.*"

Again, in the case of Brown *v.* Sutton, *supra*, the court, speaking of a similar parol promise, stated:

"Any such promise must be largely inferred from the situation and circumstances of the party, and must depend almost wholly on verbal statements made by Mr. Kenyon to others" (*p. 242*).

See also Pomeroy, Specific Performance, sec. 137.

## V.

THE PRESENT CONTRACT IS DEFINITE AND CERTAIN IN ITS TERMS, AND IS NOT OPEN TO THE OBJECTION OF WANT OF MUTUALITY.

(*a.*) It is claimed by appellant, among other things, that the contract cannot be enforced, because of its *indefiniteness.*

There is probably no objection more universally urged in suits for specific performance than that of indefiniteness, and courts have frequently remarked, speaking of this very objection, that where friends, having confidence in each other, make a bargain, with no suspicion of want of good faith, it would be extraordinary to reduce every provision to writing or to provide for every possible detail or contingency.

The evidence above, gone over in detail, establishes with much more reasonable certainty the terms of this agreement, and need not be here repeated.

In the case of Tolson *v.* Tolson (10 Md., 159) a provision in the will of testator requested his seven sons "to take care of their brother John and his family," and it was objected that the language was too indefinite; but the court sustained the devise in favor of the son John, due regard being had to his condition in life, etc.

And so in the case of Willett *v.* Carroll (*13 id., 459*) the will directed that a certain person "shall have a home during her natural life, on the farm hereinbefore bequeathed unto W."

It was there objected that such provision was too indefinite to be enforced by the court, and therefore void for uncertainty; but the court overruled such objection and held the provision in question to be valid and enforceable, due regard being had to the value of the estate, its income, and the situation of the parties, condition and habits in life, etc., the court adding:

"The word *home*, not only in its true etymology, but in its ordinary acceptation, means something more genial than a mere privilege to perambulate a dreary room."

Much stronger is the case at bar, where Dr. Piper and his wife, prior to the making of the agreement, "*had never had a home*" (*R., 170*). After the making of the agreement they for the first time had such a home, for which they had longed. Thereafter they continued to express, as shown by the undisputed testimony and writings in the case, their happiness, contentment, and entire satisfaction with the performance by complainant of his agreement during a period of more than five years, and right up until their departure on what was supposed to be but a temporary visit to Saratoga for the benefit of the health of Dr. Piper, but on which visit his wife died, and from which place the Doctor was first taken to Chicago, and there kept for some time by Thomas, and afterwards taken to Newport, Maine, by his niece, and there kept under her control.

So that it would seem clear that the objection of uncertainty and indefiniteness cannot be successfully interposed in this case.

(*b.*) Again, it is insisted by appellant that the contract is not *mutual*.

This objection, like the other, is one of universal use in cases of this kind, where parties seek to resist the performance of obligations solemnly incurred. In this connection it is to be borne in mind that it is not disputed that complainant, without objection from either, faithfully performed and kept his part of the bargain, and Mrs. Piper passed away while he was still so performing and keeping his agreement; and, so far as the Doctor was concerned, complainant faithfully performed and fulfilled it so long as he himself permitted such performance, even keeping his rooms for him, unused, for years, and continually tendering himself as ready,

anxious, and willing at all times to completely carry out and fulfill his contract.

But there is another principle of equity equally applicable, and which must be borne in mind in connection with such objection so interposed by appellant, and that is that where a party not originally bound by his covenant has completely performed, so that he may no longer be restored to the condition he occupied prior to such performance, it does not lie with the other party to complain of the original want of mutuality, even if such had in fact then existed.

This is fully shown by the foregoing authorities, and see also Fry, Specific Performance, sec. 445, p. 204; 3 Pom. Eq. Jur., p. 2163; Woodruff *v.* Woodruff (44 N. J. Eq., 349); Wilkes *v.* R. R. Co. (79 Ala., 180); Warren *v.* Warren (105 Ill., 568–574); Burdine *v.* Burdine's Ex'r (*supra*), and Brown *v.* Sutton (*supra*).

As well stated by the opinion of the court below herein, speaking of this feature of the case:

"Here, a 'definite contract for mutual considerations' is alleged to have been made. Each was under obligation to the other, and neither was at liberty to withdraw without the consent of the other. As stated by the witness, James Schouler: 'It was not optional for either party to terminate the arrangement without the consent of the other'" (*R.*, *322*).

And in the same connection the opinion of said court below, speaking of the decision in Madison *v.* Alderson (8 App. Cas., H. L., 472), relied upon by the appellant, and especially urged in support of this claim of want of mutuality, adds:

"If, however, there were no differences between the two cases, in respect of the obligation of the complainant to continue his care and support during life, we could not follow the decision in Madison *v.* Alderson, because it is opposed, on that very point, to the decision of the Supreme Court of the United States in Brown *v.* Sutton, *supra*" (*R.*, *322*, *323*).

## VI.

THE DECREE OF THE COURT BELOW WAS CORRECT AND SHOULD BE AFFIRMED.

The two decrees in this case, that of the trial court and that of the Court of Appeals, were in favor of complainant. The case stated in the original and supplemental bills of complaint is fully established by the *proofs* in the case, and the *authorities and decided cases* fully sustain the right of a court of equity to grant relief by way of specific performance, such as was decreed herein, and the decree of the court below, being right, should be *affirmed*.

Respectfully submitted.

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WASHINGTON, D. C., *November* 13, 1900.

[NOTE.—At the time of the preparation and printing of the foregoing brief counsel for appellee have not been furnished with copy of brief for appellant. Should it hereafter appear that appellant relies upon facts or propositions not covered in this brief, counsel will ask leave to file supplemental brief in reply.]